No. 93-769

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO/CLC,
Petitioner,

v.

STEPHEN T. AGUINAGA, WAYNE PAPPAN and JANET BROWN, Individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Jury in this case properly find, pursuant to unchallenged instructions, that it would have been futile for the plaintiff employees to have undertaken any further efforts to exhaust contractual grievance procedures, because of an agreement between the Union and the Employer to disregard the plaintiffs' rights under the Collective Bargaining Agreement.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Despite the fact that petitioner deliberately has not presented the Court with the question whether the jury properly held that it breached its duty to fairly represent these plaintiffs, it devotes its statement of facts primarily to reciting the evidence that it presented below in an effort to show that respondents were represented fairly. Lest the Court get the wrong impression, we provide a bare outline of the duty of fair representation claim, before discussing the efforts that class members made to

obtain relief before suit and the treatment of the futility issue below.

A. The Original Agreement

In 1979, in the course of representing the plaintiffs, petitioner union and Morrell negotiated a "Master Agreement" to control the rights and obligations of employees at all Morrell-owned union facilities. It ran until September 1, 1982 and from year to year thereafter unless proper notice was given prior to July 1. This 1979 Master Agreement applied to the employees at an Arkansas City, Kansas meat packing plant operated by Morrell, which produced "Rodeo" brand meats (the "Rodeo Plant").

This agreement contained two important job protection provisions. One, Section 10, prevented Morrell from decreasing the work force to avoid the effect of the contract.[1] This provision prohibited Morrell from firing workers to avoid paying wages established in the contract and hiring non-union workers at lower wages to take their place. The other provision, Section 100(b), prevented contracting with others to provide services formerly provided by a closed plant.[2]

B. The Secret Deal Canceling the Original Agreement

As stated by both the trial and reviewing courts, and as found by the jury, the evidence at trial established that Morrell devised and implemented a surreptitious plan to close the Rodeo Plant and to reopen it later as a non-union plant. Pursuant to this plan, Morrell closed the Rodeo Plant in June 1982, represented that this closing

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[1] Appendix to Petition for Certiorari ("Pet. App.") at 33a.

[2] *Id.* Before the Court of Appeals the Union did not challenge the finding that it breached its duty of fair representation with respect to the plaintiffs' claims arising out of Morrell's breach of Section 100(b).

was permanent, paid the plaintiffs severance benefits, and then reopened it in March 1983 as the Ark City Packing Company ("ACPC") at substantially reduced wages and benefits to the workers.[3]

The Rodeo Plant closed in June 1982, but by August 1982, the petitioner knew that this closing was nothing more than a "fraudulent move to destroy the Master Agreement contract, [and] defraud the workers * * *."[4]

The petitioner and Morrell reached an agreement in September 1982 in conjunction with negotiating the 1982 Master Agreement that would cover Morrell's open union plants. The new Master Agreement contained certain provisions that had absolutely nothing to do with the workers at these plants, but had a devastating effect on the plaintiffs.[5] Secret provisions of this new Master Agreement eliminated certain provisions of the old Master Agreement that restricted reopening closed plants, and what is more important, it excluded the plaintiffs from its scope—and did so without the plaintiffs ever having had a voice, in direct contravention of an established petitioner union policy.[6] In September 1982, at the conclusion of the Master Agreement negotiations, Morrell officials pressed petitioner's chief negotiator to allow it to reopen closed plants without facing any claim from the petitioner.[7] With this knowledge of Morrell's intention, the petitioner expressly excluded the plaintiffs from the new Master Agreement and agreed to Morrell's position.

Contemporaneous notes taken by Morrell representatives clearly establish the full and devastating impact of

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[3] Pet. App. at 33a-34a.

[4] Pet. App. at 9a; Transcript of 4-28-88 at 47, Appendix to Plaintiffs/Appellants' Brief on Appeal ("P. App.") at 487.

[5] Ex. P-165, P. App. at 295; Ex. P-166, P. App. at 296.

[6] *Id.*; Transcript of 5-16-88 at 19, 62-63, P. App. at 551, 554-55.

[7] Ex. P-220, P. App. at 327.

the secret agreements, which took the form of "side letters," entered into by petitioner union and Morrell on September 9 and 10, 1982. Petitioner agreed that Morrell could reopen the Rodeo Plant without that plant being covered by the 1982 Master Agreement.[8] The trial court found: "The language of the two letter agreements along with other direct and circumstantial evidence upon which the jury must have relied should have made the [petitioner] Union aware that Morrell had planned all along to reopen its closed plants." [9]

Moreover, in this secret bargain the petitioner agreed to go along with Morrell's breach of the plaintiffs' rights under the 1979 Master Agreement. Morrell's president testified:

> Q. As of the time the two letters had been signed * * * was it your understanding on behalf of Morrell that Morrell was free to reopen Ark City if it chose to and would not be in violation of the old or the new Master Agreement?
>
> A. Yes.
>
> Q. Was it your understanding that as of the time these two letters were signed, the union would not be able to sue Morrell for fraud upon reopening of the Ark City Plant?
>
> A. Yes, it was my understanding.[10]

This understanding was shared by Morrell's general counsel and a negotiator on behalf of Morrell.[11] These secret agreements constituted a complete sellout of the respondents for the sake of other workers at another plant.[12] The

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[8] *Id.*

[9] Pet. App. at 57a.

[10] P. App. at 508.

[11] P. App. at 497, 504-505.

[12] Transcript of 5-11-88 at 26-7, P. App. at 539-40; Ex. P-333BBB, P. App. at 350.

trial court acknowledged the effect of these letters on the plaintiff-respondent class, when it held:

> The two side letter agreements released all rights and claims the plaintiffs would have had against Morrell when the plant was reopened. Absent the side letter agreements, when Morrell reopened the Rodeo Meats plant, the plant would have been covered by the provisions of the Master Agreement. The plaintiffs would have been eligible for rehire at Master Agreement wages. The plaintiffs' rights were taken away by the execution of the side letter agreements.[13]

Making this clandestine bargain was so extraordinary, and represented such a clear departure from the proper role of any union, that the petitioner sought to keep any knowledge of this agreement from its own members. Lewie Anderson of the petitioner union conditioned signing the secret side letters only if "we [Morrell and the petitioner] agreed to keep it confidential and not spread it around the industry." [14]

The trial court held: "The [petitioner] Union concealed the existence of the side letter agreements, so that the plaintiffs did not know that their rights had been sacrificed. * * * The Union deceived the plaintiffs by concealing the side letters." [15]

The jury found that the petitioner breached the duty of fair representation that it owed to the respondents. The trial court in reviewing the jury's verdict, upheld that verdict, and characterized the petitioner's actions as "concealment," "deception" and "duplicity." [16] The trial court found "the evidence tended to show that the [petitioner], through [its Director of Packinghouse Division] Lewie Anderson, after finding out about Morrell's plan to re-

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[13] Pet. App. at 39a.

[14] Ex. P-173, P. App. 310-11.

[15] Pet. App. at 39a.

[16] Pet. App. at 39a, 41a.

open the Rodeo Plant as a low wage, non-union plant under the new name of Ark City Packing Company (ACPC) *purposely* let the matter drop." [17]

Consistent with the free ride the petitioner had promised Morrell as to the Rodeo Plant, Union officials intentionally ignored all evidence and all complaints voiced by class members that Morrell was breaching provisions of the 1979 Agreement.[18] The trial court held: "The Union acquiesced in Morrell's breach of contract." [19]

C. Petitioner's Pretense of Seeking Relief

In March 1983, the final phase of Morrell's plan occurred. It reopened the plant, completing its breach of Section 10 of the 1979 Master Agreement. Only then did the petitioner make even a feint of protecting the plaintiffs. After receiving much heat from the local union officials, petitioner filed an NLRB charge claiming that the plant's reopening involved unilateral changes of employment terms and conditions.[20] Filing the charge created an impression that the petitioner union was protecting the workers' interests. Petitioner informed the respondents that this charge would include any claims that might arise under the 1979 Master Agreement. The petitioner union informed them:

> If it is established that John Morrell & Company violated the Collective Bargaining Agreement, we will follow those provisions of the National Labor Relations Act. And, we will pursue through the National Labor Relations Board, any and all damages as a result of such violations.[21]

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[17] District Court Docket No. ("Doc.") 602, P. App. at 148-49 (emphasis added).

[18] Doc. 602, P. App. at 148-49.

[19] Pet. App. at 39a.

[20] Ex. P-371, P. App. at 401.

[21] Ex. P-230, P. App. at 334.

Tom Aguinaga, one of three class representatives, testified that it was his understanding that the petitioner union would enforce the Master Agreement in its NLRB charge.[22] After all, that is precisely what the Union told the Local.[23]

Petitioner made the conscious decision to pursue the unfair labor practice charge and seek relief before the NLRB instead of pursuing the contractual grievance remedies. That decision was reached during discussions among staff attorneys and general counsel for petitioner union. Union's counsel decided that pursuing an unfair labor practice charge was better than invoking the contractual grievance procedures.[24]

As the trial court found after reviewing the evidence, "there was sufficient evidence for the jury to find that the [petitioner] Union lulled the plaintiffs into believing that it was pursuing their interests." [25] On July 25, 1983, the petitioner—without any notice to or discussion with the local union or the plaintiffs—requested the NLRB to approve withdrawal of its charge.[26] This withdrawal was the end of yet another secret bargain petitioner had struck with Morrell. In return for Morrell's agreeing to let it represent the workers of the reopened plant, petitioner union agreed to give up this attempt to enforce

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[22] Transcript of 4-15-88 at 38, Appendix to Plaintiffs/Appellants' Reply Brief ("P. Supp. App.") at 214-15.

[23] It is a flat misstatement of the record to claim that the petitioner did not suggest that a grievance not be filed. That is clearly the message that was conveyed when the petitioner informed these workers that it would seek contractual remedies on their behalf under the National Labor Relations Act. (P. App. at 334.)

[24] Appendix to Appellee/Cross Appellant's Brief on Appeal ("D. App.") at 1127.

[25] Pet. App. at 43a.

[26] Ex. P-238, P. App. 337.

plaintiffs' rights under the 1979 agreement. These bargains again were struck without local union knowledge. On September 8, 1983, the NLRB approved withdrawal of the charge.[27] After learning of his final act that ended all pretense of petitioner attempting to enforce any of the contractual rights of the plaintiff-respondent class, the plaintiffs brought suit in September of 1983. At this point, filing a grievance would have been untimely.

D. Proceedings Below Concerning the Futility Issue

At the trial of this matter, the evidence of futility was so strong that the International Union did not seek a directed verdict on this question.[28] Indeed, the trial judge nearly decided not to submit the issue to the jury. Even after determining to submit the issue, he noted: "I don't believe the jury will have much trouble with that one saying it would have been a futile thing * * *." [29]

The Court instructed the jury without objection that failure to exhaust a contractual grievance procedure would be excused if, under the specific facts and circumstances, resort to that procedure would have been futile. In a specific interrogatory, the jury was asked, "Were the plaintiffs excused from exhausting their remedies with regard to Morrell's breach of Section 10 of the 1979 Master Agreement." The jury answered, "Yes." [30]

The trial court found sufficient evidence to support the futility finding:

> The evidence indicated that after Morrell closed the plant and paid the plaintiffs severance benefits,

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[27] Ex. P-238, P. App. at 337.

[28] In its Reply Brief below, the Union candidly admitted: "The UFCW presses one issue on appeal that was not directly raised on directed verdict: the exhaustion issue." (Reply Brief at 3.)

[29] Transcript of 6-2-88 at 158, P. Supp. App. at 236.

[30] Pet. App. at 46a.

> the Union claimed to no longer represent the plaintiffs. The two side letter agreements allowed Morrell to reopen the Rodeo Meats plant without the protections of the Master Agreement. Morrell then reopened the plant. *The Union chose to file an unfair labor practice charge instead of pursuing contractual remedies.* The Union voluntarily dropped the unfair labor practice charge after the National Labor Relations Board decided to issue a complaint. The decision to withdraw the charge was kept secret. The inference arose that the Union acquiesced in Morrell's actions to achieve status as the bargaining representative for the newly reopening plant. *The evidence was so strong that the court originally did not intend to submit the futility issue to the jury. However, out of an abundance of caution, the court did submit the questions.* The evidence was such that the jury could find that the Union was more interested in being recognized as the bargaining representative for the newly reopened plant than in continuing to represent the plaintiffs' interest. The evidence presented a jury question as to whether it would have been futile for the plaintiffs to attempt to exhaust remedies.[31]

The Tenth Circuit also rejected the Union's challenge. It held:

> Under the 1979 Master Agreement, an individual employee could initiate the grievance procedure, but the later stages of the grievance process required union participation. Although the local unions generally had primary responsibility for enforcing the 1979 Master Agreement, *the evidence supports a finding that in the case of Morrell's Section 10 breach, the [International] Union, not the Local, assumed control over the matter. Upon the reopening of ACPC, the Union reassured Plaintiffs that if Morrell had violated the 1979 Master Agreement, the Union, not the Local, would seek to remedy the vio-*

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[31] Pet. App. at 40a-41a (emphasis added).

> *lation.* Therefore, in determining whether Plaintiffs are required to exhaust, the relevant inquiry is whether the Union, not the Local, breached its duty of fair representation. As set out *supra* part II.B. Plaintiffs successfully proved that the [International] Union breached its duty of fair representation by refusing to protect Plaintiffs' interests in the face of Morrell's Section 10 breach. Plaintiffs were therefore not required to exhaust; accordingly, the jury finding that Plaintiffs' failure to exhaust was excused is reasonable.[32]

REASONS FOR DENYING THE WRIT

I. THE PETITION WAS FILED UNTIMELY

The first reason for denying the writ is that the petitioner filed the petition too late. The court of appeals issued its decision on May 17, 1993. Although petitioner was granted an extension of time until Wednesday, June 16, to file a petition for rehearing, that petition was in fact not filed until Thursday, June 17. Unlike a brief, which under Rule 25, F.R. App. P., is deemed filed as of the date of mailing, a petition for rehearing is filed as of the date it is received by the clerk. We have lodged with the Clerk a copy of the docket sheet of the court of appeals showing that the petition for rehearing was not received, and therefore was not filed, until a day too late.

Pursuant to Rule 13.4, the time for seeking certiorari runs from the time a petition for rehearing is denied only if that petition was timely filed, otherwise, it runs from the date of the original decision. Because the petitioner did not timely file the petition for rehearing, the deadline for seeking certiorari was August 17, 1993. After that date, the Court lacked jurisdiction to grant certiorari. Thus, although on October 1, 1993, Justice Ginsburg granted an extension of time for filing the petition for writ of certiorari, ruling on an application that repre-

[32] Pet. App. at 12a-13a (emphasis added).

sented that rehearing had been timely sought, the Court actually lacked jurisdiction to grant certiorari at that time.[33] The order granting an extension does not operate to cure the lack of jurisdiction, and the petition remains untimely.

II. PETITIONER FAILED TO PRESERVE THE FUTILITY ISSUE FOR REVIEW IN THIS COURT

The petition asks the Court to decide the circumstances in which the futility exception may be applied to excuse compliance with the general rule that workers who pursue hybrid actions under the duty of fair representation and section 301 normally must exhaust contractual grievance remedies. Without any objection from petitioner, the question of whether the futility exception applied in this case was presented to the jury for its decision pursuant to a special interrogatory. It is not clear whether petitioner's claim here is that there was insufficient evidence of futility to support the jury's verdict, or that the legal standard under which the jury was instructed was incorrect. In either event, the petitioner did not preserve the issue for appellate review.

If the petitioner seeks to present a question about the proper standard for determining futility, that issue has not been preserved for review because petitioner never challenged the standard under which the jury was instructed on the issue of futility. The petitioner did not object to the instruction on futility, and did not argue that the court improperly instructed the jury on that issue before either the trial court[34] or the Court of Appeals. The petitioner cannot now challenge the instructions.[35]

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[33] Respondents did not receive the application until after it had been granted.

[34] *See* Pet. App. at 40a.

[35] Rule 51, F.R. Civ. P., provides: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating

If on the other hand, the point is simply that there was insufficient evidence of futility, it is settled law that in order to challenge a verdict as insufficient under the evidence, the appealing party must have sought a directed verdict on that issue. *Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 663 n.11 (10th Cir. 1991). *See also*, 5A Moore's Federal Practice, ¶ 50.05[1]. This requirement ensures that the non-moving party receives notice of any deficiency of proof and an opportunity to cure that proof before having judgment entered against that party for failure to show a certain fact. As stated by *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1346 (9th Cir. 1986):

> If the moving party is then permitted to make a later attack on the evidence through a motion for judgment notwithstanding the verdict or on appeal, the opposing party may be prejudiced by having lost the opportunity to present additional evidence before the case was submitted to the jury.

In the present case, the Union admittedly did not seek a directed verdict on the question of exhaustion.[36] A timely motion for directed verdict on this issue would have permitted the plaintiffs an opportunity to flood the record with evidence bearing on this point. Because it failed to raise this issue in a directed verdict motion at the close of the plaintiffs' case, and at the close of all evidence, petitioner should not be heard to complain about the lack of evidence bearing on this issue.

In fact, the futility issue was not a contentious issue at the time of trial. Because it played at best a very minor part in the petitioner's defense, the trial court nearly did not send the issue to the jury—and when that court did,

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distinctly the matter objected to and the grounds of the objection." *See also*, 5A Moore's Federal Practice ¶ 51.04.

[36] The Union's Reply Brief below stated: "The UFCW presses one issue on appeal that was not directly raised on directed verdict: the exhaustion issue." (Reply Brief at 8.)

the trial judge observed that the jury would not have any problem in finding facts sufficient to find futility. The failure to press this issue timely is, in itself, a candid admission by the Union how little it thought of this defense at the trial court level and should prevent the Union from raising it at this point.

III. THERE ARE NO SUBSTANTIAL CONFLICTS IN THE LAW APPLIED BY THE FEDERAL COURTS ON THE FUTILITY ISSUE

Federal labor policy recognizes that in most instances, labor disputes are best resolved when grievance procedures established in collective bargaining agreements are employed. This Court has established that generally, some resort to the contractual grievance proceeding is a necessary predicate to asserting a breach of contract claim in federal court. *Republic Steel v. Maddox*, 379 U.S. 650 (1965). This important policy is fulfilled if the employee "afford[s] the union the opportunity to act on his behalf." *Id.* at 653.[37] The cases, such as *Carr v. Pacific Maritime Ass'n*, 904 F.2d 1313 (9th Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991), are concerned with insuring that the Union receive timely notice of the complaint and an opportunity to act on it. 904 F.2d at 1318, n.7.

This Court held in *Glover v. St. Louis San Francisco R. Co.*, 393 U.S. 324, 330 (1969) that resort to contractual remedies is not required in "the situation where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Glover* itself recognized that it would be wholly futile to consign an employee to a grievance and arbitration procedure "administered by the Union, by the company, or both, to

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[37] As the petitioner pointed out, the normal situation existed here, and the Union had "discretion to supervise the grievance machinery and to invoke arbitration, [and] the employer and the union contemplate[d] that each [would] endeavor to settle grievances short of arbitration." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967).

pass on claims by the very employees whose rights they have been charged with neglecting and betraying." 393 U.S. at 330-331.

The federal law governing when exhaustion of contractual remedies is excused is established by this Court's decisions in *Vaca v. Sipes*, 386 U.S. 171 (1967); *Glover v. St. Louis San Francisco R. Co.*, 393 U.S. 324 (1969), and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). The futility doctrine as framed in these cases forms the controlling law applied by all the courts that address this question. The circuits have applied this controlling law with a surprising degree of uniformity.

For example, in *Hendricks v. Edgewater Steel Co.*, 898 F.2d 385, 388-89 (3d Cir. 1990), the court cited *Vaca v. Sipes* for the proposition that "the employee may be excused from [the exhaustion] requirement where resorting to the grievance procedure would be futile, * * *." *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1039 (6th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990), cited *Glover* for the exception that occurs "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Amburgey v. Consolidation Coal Co.*, 923 F.2d 27, 29 (4th Cir. 1991), *Roman v. U.S. Postal Service*, 821 F.2d 382, 385 (7th Cir. 1987), and *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518 (5th Cir. 1978) cite both *Vaca v. Sipes* and *Glover* and recognize that these cases provide the governing standards on futility.[38]

All these cases recognize that the standard to be applied is essentially the same. In each case cited by the petitioner, the burden is placed upon the injured employee to prove that resort to contractual remedies would have been futile. The minor extent to which

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[38] *Durham v. Mason & Dixon Lines, Inc.*, 404 F.2d 864 (6th Cir. 1968), *cert. denied*, 394 U.S. 998 (1969), was decided before *Glover* and so cannot be a representation of how futility, as defined by *Glover*, is interpreted in the Sixth Circuit.

the circuit courts reframe this test represents no dispute among them as to what the applicable standards are—this Court's decisions have supplied them. The fact that there is absolutely no discourse or disagreement among the circuits as to the standards to apply clearly evidences the lack of any dispute among the circuits. Not one circuit case cited to establish this supposed conflict has criticized, distinguished, or even cited any other circuits' case cited by the Union. None of the cases hint at the existence of any conflict as to the applicable standards.

The truth told by the various cases cited by the petitioner is that determining when exhaustion of contractual remedies is futile is a factually intensive undertaking. Each case revolved around the facts unique to it. Given the factually intensive nature of this inquiry, it is important to note that in none of the cases cited by the Union has a jury entered a specific finding of futility.

IV. UNDER ANY CIRCUIT COURT'S INTERPRETATION OF *GLOVER*, THE ACTIONS BY THE UNION WOULD HAVE BEEN SUFFICIENT TO SUPPORT A FUTILITY FINDING

Not only is there no substantial split among the lower courts about the standards to be employed in applying the futility exception to the exhaustion requirement, but the law uniformly applied by the circuits also clearly supports the jury's verdict in this case, for several reasons. The gist of respondents' charge against petitioner-union and defendant John Morrell was that they negotiated a secret agreement canceling a previous collective bargaining agreement, under which respondents enjoyed important rights in the event of a plant closing, and substituted for it a separate agreement that gave respondents no rights, but guaranteed petitioner the right to represent (and therefore derive dues income from) the employees of a newly opened plant.

It would seem obvious that it would have been futile for respondent to pursue a grievance under the old agree-

ment. Had respondent done so, the employer would have simply advised the arbitrator that petitioner-union had already agreed to cancel respondents' rights under the old agreement and substitute the new agreement for it, and the outcome of the arbitration would have been a foregone conclusion.[39] A stronger case for futility is hard to imagine.

And, indeed, the courts of appeals routinely hold that futility exists under such circumstances. For example, in *Glover v. St. Louis San Francisco R. Co.*, 393 U.S. 324 (1969), the union and the employer were alleged to have been "acting in concert." If true, "insistence that petitioners exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." 393 U.S. at 331. This case, is indistinguishable from these pertinent aspects of *Glover*. Petitioner-Union was found to have affirmatively agreed with the employer to strip these respondents of their contractual rights. Holding that these class members should have applied first to the petitioner and their employer for redress of an injury that the petitioner and employer secretly agreed to inflict on them only would have served to prolong the deprivation of these class members' rights.

There simply is no conflict among the circuits that this situation makes resort to a contractual grievance procedure futile. *E.g., Geddes v. Chrysler Corp.*, 608 F.2d 261 (6th Cir. 1979) (fact question presented on futility when Union and employer had agreed to adverse contract meaning); *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir. 1978) (summary judgment for employer reversed on futility claim where employee attacked contractual amendment, which both Union and employer had approved); *Lusk v. Eastern Products Corp.*, 427 F.2d

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[39] In fact, that is precisely what happened when the petitioner pressed its NLRB charge. *See* Ex. U-1378, D. App. at 629-642.

705, 708 (4th Cir. 1970) (employee cannot be forced to arbitration proceeding between "the two parties charged by the employee with combining to defraud him.").

Nevertheless, respondents did make an effort to obtain relief from the union, and the outcome of those efforts simply confirms the finding that any further effort would have been futile, and that the class members did everything that reasonably could be done to assert the class members' contractual rights. When the plant reopened as ACPC, a local union official undertook to (1) gather information from class members; (2) advise class members to apply at the reopened plant; and (3) coordinate a response with the petitioner-union.[40] In fact the petitioner was "getting calls almost daily" from a local union official, and the petitioner was asking the local "to continue getting information about the picture on the scene about what was happening locally, about when they were hiring, who they were hiring, [and] what terms and conditions they were offering * * *."[41] Clearly, the federal policy requiring at least an attempt to exhaust administrative remedies has been met by showing "repeated complaints to company and Union officials." *Glover*, *infra* at 330-331.

Petitioner used this information supplied by class members first to actively contemplate pursuit of the contractual grievance procedure, and then to pursue an unfair labor practice charge. The petitioner's active consideration of pursuing this contractual breach through the grievance process is clearly evidence that class members had—at least informally—invoked that grievance system.

Petitioner's attorneys testified to their decision not to pursue a grievance. In fact, they arrived at a conclusion that "we would have been foolish to pursue an arbitration on something as big as this and think that we were going

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[40] D. App. at 1172-74.

[41] D. App. at 1424.

to get people back to work. That's why we filed the charges." Petitioner-Union concluded that through the unfair labor practice charge, the class members could obtain enforcement of all their contractual rights.[42]

Petitioner's attorneys discussed how best to redress the contractual wrong suffered by the plaintiffs. One attorney for the petitioner testified: "I think that we discussed whether or not what our best route was to go, whether or not we had rights under the contract that could be pursued by it through a grievance or under the National Labor Relations Act and determined that filing the charge was our better position." [43]

After petitioner's attorneys rejected the position that the Union should pursue the plaintiffs' contractual rights through a grievance procedure, and opted to pursue an unfair labor practice charge, petitioner informed the class members of its decision:

> This is to advise that we are investigating the reopening of the Arkansas City plant. If it is established that John Morrell & Company violated the Collective Bargaining Agreement, we will follow those provisions of the National Labor Relations Act. And, we will pursue through the National Labor Relations Board, any and all damages, as a result of such violations.[44]

Class members understood Petitioner-union's notice to indicate that the petitioner would enforce the Master Agreement before the NLRB, and that they had to do nothing further to obtain enforcement of this contract.[45]

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[42] P. Supp. App. at 218-219.

[43] P. Supp. App. at 242-43.

[44] P. App. at 334.

[45] P. Supp. App. at 214-15. Futility also has been found to excuse the filing of grievances by similarly situated claimants after the Union has rejected one claimant's grievance. *Schultz v. Owens-Illinois, Inc.*, 696 F.2d 505, 511-12 (7th Cir. 1982).

Petitioner's position before this Court is that these class members should have disregarded the petitioner's assurances that it was protecting their contractual rights, and should have filed and pressed a grievance. The record shows, however, that petitioner-union did not need any further action by the plaintiffs in order to pursue a grievance proceeding against Morrell—it considered such a grievance as an option. It would be the utmost in absurdity to hold that the plaintiffs were required to formally ask the petitioner-union to do something that the petitioner already had determined not to do and had informed the class it would not do.

In fact, although Union attorneys rejected the grievance process, other Union officials, including the Union's Director of the Packinghouse Division, under no circumstances would have allowed a class member to press a claim for a contractual breach. The Tenth Circuit stated the evidence that supported the liability finding:

> [I]n August 1982, the Union knew of Morrell's plan to reopen the Rodeo Plant as a nonunion plant. Morrell's plan constituted a breach of Section 10 of the 1979 Master Agreement, yet the Union took no steps to remedy the breach. Instead, the Union entered into the two side letters with Morrell releasing all rights and claims Plaintiffs would have had against Morrell when the plant reopened. The Union then deceived Plaintiffs by concealing the side letters. As a result, Plaintiffs did not know that their rights had been sacrificed. Lastly, in an effort to conceal its acquiescence in Morrell's breach of Section 10, the Union filed an unfair labor practice charge against Morrell. However, after the NLRB decided to issue a complaint, the Union withdrew the charge and kept the withdrawal secret.[46]

The evidence showed, and the jury found, that the Union had struck a deal with Morrell specifically to sacri-

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[46] Pet. App. at 9a-10a.

fice the plaintiffs' rights under the contract. Where the Union and the employer have already agreed to sacrifice the rights of an employee, as previously shown, there is no conflict among the circuits but that it is absolutely futile to require that the employee go through the motions of filing a formal grievance.

CONCLUSION

For the foregoing reasons, this Court should not grant the petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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